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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 182

METALLIC BUILDING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 227-231)[1] is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 166-214) are reported at 98 NLRB 386.

JURISDICTION

The decree of the court below was entered on June 19, 1953. The petition for a writ of certiorari

[1] The symbol "R" refers to the transcript of record; the symbol "B.A." refers to the appendix to the brief filed by the Board in the court below.

was filed on July 16, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Petitioner discharged two employees because in the course of an organizing campaign they had circulated or signed cards authorizing a council composed of affiliated craft unions to represent them in collective bargaining. The council admits no individuals to membership but after its designation as bargaining representative it invites the employees to join the various craft unions affiliated with it. The question presented is whether petitioner in discharging the employees violated Section 8 (a) (3) of the Act by discouraging membership in a labor organization.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151 *et seq.*), are set forth in the petition, p. 13.

STATEMENT

The Board and the court below found that petitioner, in addition to other unlawful conduct violative of Section 8 (a) (1) of the Act, discharged employees Hugo S. Baker and L. B. Hightower because of their activity on behalf of the Houston Metal Trades Council, herein called the Council, thereby violating Section 8 (a)(3) of the Act (R. 166-197, 229-231). Petitioner, admitting that

it violated Section 8 (a)(1) and that it discharged Baker and Hightower because of their activities on behalf of the Council, insists that the discharges did not violate Section 8 (a)(3) (R. 228, 231, Pet., *passim*). Petitioner argues that the discharges did not have the purpose or effect of discouraging membership in the Council because that organization is composed solely of affiliated labor unions and does not itself admit individual employees to membership. The facts relevant to this issue may be briefly summarized as follows:

When petitioner's employees evinced an interest in joining a union, employee Baker obtained a supply of "authorization cards" from the business agent of the Council (R. 189; B.A. 55-56). The cards stated that the "undersigned employee" authorized "the [Council] affiliated with the American Federation of Labor, to represent me and, in my behalf, to negotiate and conclude all agreements as to . . . employment conditions in accordance with the provisions of the National Labor Relations Act . . ." (B.A. 192). Petitioner discharged Baker for circulating these cards, stating that he was "trying to organize this plant and get a union in here" (R. 190; B.A. 63); it discharged Hightower because he admitted signing a card and expressed an intention to "vote for the union" (R. 207-208; B.A. 95-96).

The Council is composed of various unions in the metal trades industry, "such as the Boilermakers, Pipefitters, Sheet Metal Workers, and so forth" (B.A. 48). The customary organizing procedure

of the Council is first to obtain authorization cards from the employees of an unorganized plant, then to petition the Board for certification, and finally to encourage the employees to join the craft unions having jurisdiction of the work in that plant (B.A. 48-49). The Council itself conducts bargaining with the employers, but the individual employees are members of the craft unions and not of the Council (B.A. 48-52).

On these facts the Board, holding that petitioner's discharge of Baker and Hightower violated Section 8 (a)(3) of the Act, entered its order directing petitioner to reinstate the employees with back pay, and, *inter alia,* to cease and desist from "discouraging membership in [the Council] or in any other labor organization of its employees . . ." (R. 169-170). Petitioner resisted enforcement in the court below, contending as it does here that since "individual employees canot become members of the Council, the discharges complained of could not . . . have been for the purpose or have had the effect of discouraging membership in it" (R. 230). The court below, speaking through Chief Judge Hutcheson, rejected the contention as mere "shadow boxing with words" and enforced the order of the Board (R. 231).

ARGUMENT

In discharging two employees because they signed or circulated cards authorizing the Council to act as their bargaining representative, petitioner committed the precise unfair labor practice—dis-

charge of an employee because he engaged in union activity—which is outlawed by Section 8 (a)(3). Petitioner's contention that the statute is not violated because the Council admits only unions, and not individuals, to membership is, to say the least, "a bit of verbal logic from which the meaning of things has evaporated" (*Phelps Dodge Corp. v. National Labor Relations Board,* 313 U. S. 177, 191). Correctly characterized by the court below as "shadow boxing with words" (R. 231), the contention warrants no review by this Court.

In the normal course of organization the employes who authorized the Council to represent them would have been allocated by it to the appropriate craft union affiliated with it (*supra,* pp. 3-4). Consequently, in discharging employees because they authorized the Council to represent them, petitioner discouraged membership in the unions affiliated with the Council which the dischargees were eligible to join and to which the Council would have referred them. This circumstance in itself establishes the propriety of the Board's order, for Section 8 (a)(3) prohibits discouraging membership "in *any* labor organization" (emphasis added), and the Board's order refers to the Council "or any other labor organization" (R. 169, 172).

Moreover, whatever formal role the Council had as the superstructure for a group of unions, it performed an additional role *vis-à-vis* individual employees in the first stage of an organizational drive. It accorded the individual employee a form of embryo membership pending assignment to a specific

union—similar to the function performed by an International which organizes and solicits employee memberships, and thereafter assigns these memberships to one of its local unions. In this sense, therefore, the discharges in this case discouraged membership in the Council itself.

Contrary to petitioner's contention, the decision of the court below is not in conflict with *National Labor Relations Board* v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C.A. 3), or *National Labor Relations Board* v. *Del E. Webb Const. Co.*, 196 F. 2d 702 (C.A. 8). In *Reliable*, the granting of wage increases to union members only pursuant to a contract with the union, and the withholding of such increases from non-members, was held not to violate Section 8 (a)(3). The court noted that the employer had no intention of favoring the union group, that the payments were not discriminatory but merely reflected the stronger bargaining power of the union members, and that, even assuming discrimination, its effect was not to encourage union membership because the favored union had no intention of admitting the non-union men to membership. 187 F. 2d at 550-552. In the instant case, on the other hand, the employer had every intention of discriminating against supporters of the Council; the discharges constituted such discrimination; and the Council welcomed the adherence of the discharged employees and encouraged their membership in the unions affiliated with it. In *Webb*, the discharged employee belonged to a union of apprentices and lacked the qualifications for mem-

bership in the journeymen's union. The court held that his discharge for want of journeyman status did not encourage membership in the journeymen's union because "his status so far as union affiliation were concerned, was fixed and could not be changed at least by any act of the respondent company." 196 F. 2d at 705. No similar condition prevails in the instant case.

CONCLUSION

The decision of the court below is correct, is not in conflict with decisions of other courts, and presents no substantial issue warranting review. The petition for certiorari should therefore be denied.

Respectfully submitted,

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AUGUST, 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 [illegible]